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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 175

CONGRESS CONSTRUCTION CORP., *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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August 5, 1963.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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RESTATEMENT OF SOME ESSENTIAL FACTS

The opinion below states: "In February, 1953 the Senate Committee informed the Defense Department that it desired that all future requests for Committee approval [of land acquisitions by the military services] should indicate the concurrence of the Secretary of Defense" (Pet. App. 4a). This erroneous statement is repeated on pages 4 and 9 of respondent's brief in opposition to the petition

for certiorari. A copy of the letter of February 26, 1953 from the Chairman of the Senate Armed Services Committee to the Secretary of Defense was admitted in evidence as Defendant's Exhibit 89 and is set forth in the Appendix hereto at page 17a. This letter does *not* state "that all future requests for Committee approval should indicate the *concurrence* of the *Secretary of Defense*".[1] In pertinent part, the letter merely states:

> "The Committee requests that future submittals made pursuant to the foregoing and which come within the cognizance of the Director of Installations, Department of Defense, contain a paragraph indicating *whether* the submittal has his *concurrence*."

It thus becomes obvious that the respondent is in error when it argues on pages 9 and 10 of its brief in opposition that "this communication would appear to make the Secretary's approval a condition precedent to the submission of a proposal [for land acquisition by the military services] to the Committee." The language of the letter makes it clear that the Committee did not *delegate* to the Secretary of Defense the power to determine whether such real estate acquisitions should be made, but retained that sovereign power where it had been vested by statute—in the Senate Committee. Before making its determination on future acquisitions, the Senate Committee merely wanted to have the *opinion* of the Director of Installations as to the advisability thereof.

The Court below assumed *arguendo* that "the Navy was legally bound to plaintiff to make a good faith attempt to persuade the [Congressional] Committees [to authorize the purchase of petitioner's land] once plaintiff and the Navy had come to terms." However, before making this assumption, the Court below stated erroneously that "though it was expected that the Navy would present the

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[1] All emphasis herein is supplied by petitioner.

matter to the Committees *no such express undertaking was given*" (Pet. App. 5a). The respondent repeats this error on page 7 of its brief in opposition. The Navy's express undertaking to seek approval of the Congressional Committees is set forth in its letter of May 29, 1953 to petitioner. That letter provides in pertinent part:

> "The 'Certification' is valid subject to Navy ownership of the site.' Acquisition of the site by the Navy is contingent upon securing Congressional clearances which may require 4 to 6 weeks. *This office is presently obtaining information to forward to the Bureau of Yards and Docks to obtain the necessary Congressional clearances.* In the event you desire to file an application for an FHA mortgage commitment in order that you might obtain such commitment prior to the 30 June expiration date of the Title VIII legislation, you must assume the risk *of the Navy obtaining favorable action by Congressional Committees for acquisition of the site.*
>
> "The attached 'Certification' is delivered upon the further condition that you will effect a closing with FHA for the construction of the project within 90 days of the receipt thereof." (Finding 13, Pet. App. 17a)

Upon this express confirmation of the implied obligation to seek favorable action by the Committees, petitioner spent $12,730.20, the fee it was required to pay the Federal Housing Administration upon the filing of petitioner's application for the mortgage commitment, and an additional $21,030, the fee it was required to pay FHA for the issuance of the mortgage commitment (see petitioner's Exhibit 13 in evidence which is reproduced on page 4a of the appendix hereto).

The opinion below states that "by the end of July 1952 authorization was given the local naval official to negotiate with plaintiff for a 500-unit Wherry housing project on this land (which the Government would purchase)" (Pet. App. 2a, 3a). In so stating, the Court below ignored the

essential fact that this authorization emanated from the Office of the Secretary of Defense (Findings 6, 7, and 9 Pet. App. 12a, 13a). It was necessary to obtain such authorization because the Navy contemplated the expenditure of not more than $500,000 in appropriated funds for the purchase of petitioner's land, preparation of the site and on-site utilities (Finding 10 Pet. App. 13a); and the 1951 Addendum to the Wherry Act (65 Stat. 365, 12 U.S.C. (1952 ed.) § 1748i) *authorizing funds for land acquisitions for Wherry Act housing projects*, expressly provided that "such funds may be expended by the respective military departments for housing purposes *when the Secretary of Defense*, after consulting with the Federal Housing Commissioner, determines that such housing projects should be constructed and that such expenditures are essential to the construction of satisfactory housing."

ARGUMENT

I.

The Assistant Secretary of Defense Was an Interloper and Trespassed on the Navy's Authority When He Insisted on His Right to Approve the Transaction Involving the Purchase of Petitioner's Land.

The Court of Claims held that

> "But when purely executive functions of a discretionary nature are imposed on a subordinate official of the Government it is an implied condition that his actions (before they have become final) are subject to the review and supervision of his superiors—*if the superior is authorized to intervene* in that particular field *and does so in time*." (Pet. App. 6a).

The petitioner acknowledges this to be a correct statement of the law.

The Court below also found that the Secretary of Defense

> "was endowed with undeniable supervisory control, general and specific, over the purchase of land from the plaintiff",

and

> "was also authorized to delegate the functions [i.e., the supervisory control] to an Assistant Secretary" (Pet. App. 8a).

The petitioner does not quarrel with these findings.

But petitioner believes the Court was plainly incorrect in holding (1) that the Secretary of Defense had delegated such supervisory control to an Assistant Secretary and (2) that such Assistant had intervened in time to prevent the actions of the Secretary of the Navy from becoming "final", and obligating the respondent, that is, the entire Executive Branch, not the Navy alone, to use its best efforts to persuade the Congressional Committees to approve the purchase of petitioner's land (Pet. App. 8a-10a).

The Court below did *not* find that the Secretary of Defense, himself, forbade the Secretary of the Navy to seek the Committees' authorization to purchase petitioner's land; and tacit concession that the Secretary of Defense did not do so appears on page 10 of respondent's brief in opposition. The Court *did* find, however, that Reorganization Plan No. 6 of 1953 had transferred the functions of the Director of Installations to the Secretary of Defense who, in turn, had delegated such functions to an Assistant Secretary (Pet. App. 8a). It was upon this delegation of authority, and this delegation alone, that the Court held that the Assistant Secretary acted *lawfully* in forbidding the Secretary of the Navy from seeking the Committees' authorization to purchase petitioner's land. As already pointed out on page 8 of the petition for certiorari, the functions of the Director of Installations did *not* include the authority to interfere with the statutory duties imposed on the Secretary of the Navy by Section

601 of Public Law 155 and, therefore, the delegation of the Director's functions to the Assistant Secretary *could not give the latter such authority.* Furthermore, on pages 8 to 10 of the petition, it is shown that the Department of Defense Directive, dated August 13, 1953, did not confer such authority on the Assistant Secretary because it required that

> "Directives recommended by the Assistant Secretary of Defense (Properties and Installations) which intend to change established policies or procedures will be signed by the Secretary or Deputy Secretary of Defense and their implementation will be accomplished by the secretaries of the military departments or their designated agents";

and, as the Court acknowledged, from 1943

> "Until early 1953 it had been the Navy's practice to submit its real estate transactions directly to the Congressional Committees without clearing through the Department of Defense" (Pet. App. 4a).

Moreover, at pages 10 and 11 of the brief in opposition, respondent admits that it was not until September 4, 1953 that the Assistant Secretary issued a memorandum formally requiring the Secretary of the Navy to submit to him for prior clearance all real estate transactions which required approval of the Congressional Committees; and also admits that the September 4th memorandum did not bear the signature of the Secretary of Defense or his Deputy.

Having conceded that the Court of Claims erred in holding that Reorganization Plan No. 6 of 1953 constituted a delegation by the Secretary of Defense to an Assistant Secretary of supervisory control over the acquisition of petitioner's land by the Navy, respondent attempts to locate such delegation elsewhere by means of circuitous and fallacious argument. The respondent contends that since the Assistant Secretary, *informally and without delegated authority,* had been exercising the power of

"clearance" since July 29, 1953, and had thus illegally changed the procedure established by Section 601 of Public Law 155, whereby the Secretary of the Navy had to "come into agreement" with the Congressional Committees, the subsequent formal usurpation of the power of "clearance" by the Assistant Secretary's memorandum of September 4, 1953 nullified the requirement of the Departmental Directive of August 13, 1953 that recommendations of the Assistant Secretary which intend to change established policies or procedures be signed by the Secretary or Deputy Secretary of Defense. This is just another way of saying that, although the Assistant Secretary could not possibly have the power of "clearance" unless it was delegated to him by the Secretary or his Deputy, the Assistant Secretary could lawfully confer the power upon himself by first exercising the power illegally and then formally proclaiming that the exercise thereof was valid. To state respondent's proposition is to expose its absurdity.

Upon the authority of *Perkins* v. *Lukens Steel Co.*, 310 US 113, 126 and *Friend* v. *Lee*, 221 F.2d 96, 100 (C.A.D.C.), respondent finally claims that even if the power of "clearance" was not delegated to the Assistant Secretary, petitioner has no standing to complain of the Assistant Secretary's unauthorized exercise of that power. The decisions in the *Perkins* and *Friend* cases actually support petitioner's position and the decision of the Court of Claims in the case at bar is in conflict with them. The Secretary of Defense authorized the Secretary of the Navy to negotiate with petitioner for a 500 unit Wherry Housing Project on petitioner's land which the Government would purchase. Pursuant to that authority, the Secretary of the Navy agreed to make a *bona fide* effort to secure the approval of the Congressional Committees for the acquisition of petitioner's land, provided petitioner, at its own expense, developed plans and specifications for the project which were satisfactory to the Navy and was able

to reach agreement with the Navy on all terms and conditions upon which the petitioner would construct the project. As soon as petitioner fulfilled its part of the bargain, the action of the Secretary of the Navy became "final" and petitioner had a *legal right* to have the Secretary of the Navy, *as the statutory representative of the entire Executive Branch*, seek the approval of the Congressional Committees for the purchase of petitioner's land. When the Assistant Secretary of Defense subsequently intervened without authority and prevented the Secretary of the Navy from so doing, petitioner's *legal right* was invaded.

II.

Even If the Assistant Secretary of Defense Was Authorized to Intervene, the Contractual Arrangements of the Secretary of the Navy Became Final Before the Intervention.

As shown by the restatement of facts above, the 1951 Addendum to the Wherry Act required the Secretary of the Navy to obtain authorization from the Secretary of Defense before contracting to expend appropriated funds "for land acquisitions for Wherry Act housing projects"; and on July 31, 1952, the Secretary of Defense gave such authorization to the Secretary of the Navy to enable the latter to "negotiate the project" involved in the case at bar. By Department of Defense Directive of December 1, 1951, which is Enclosure (1) to Defendant's Exhibit 85, both of which are reproduced on pages 6a to 16a of the Appendix hereto, the Secretary of Defense prescribed in detail the manner in which he delegated to the Secretary of the Navy the power to enter into "contractual arrangements" for the construction of a Wherry housing project, after obtaining the authorization from the Secretary of Defense to expend appropriated funds for that purpose. In accordance with the provisions of said Directive, and prior to the intervention by the Assistant Secretary of Defense, the following had been accomplished:

1. In September 1952 the petitioner submitted plot plans and building interior layouts to the Navy and FHA. The Navy considered them to be sufficiently detailed for it to determine whether a satisfactory project could be developed within Navy-approved rentals and within the appropriations for assistance not to exceed $500,000 for land acquisition and for construction of utilities. Such tentative drawings were approved by the FHA subject to development of working drawings to be revised in such detail as might be required to embody all currently effective FHA minimum property requirements (Finding 10, Pet. App. 13a).

2. By January 19, 1953, the Navy found petitioner's proposal for design, construction and management of a 500 unit project "generally acceptable with respect to site planning, building types, floor areas, dwelling unit plans and construction as indicated on preliminary plans" but that other aspects of the proposal would have to be modified before acceptance in its entirety. On February 19, 1953, petitioner submitted an amendment to its prior proposal, based upon changes suggested at a meeting of its and the Navy's representatives. Among the changes was a reduction from $700,000 to $500,000 of appropriated fund assistance to the project to be provided under Public Law 155, 82nd Congress. On the same date, petitioner also submitted an amended FHA Project Analysis Form No. 2264W. By letter dated February 27, 1953, the Navy advised petitioner that its proposal, as amended, was "generally acceptable with respect to rental rates, *appropriated fund assistance*, site planning, building types, floor areas, dwelling unit plans and construction as indicated on preliminary plans". On May 14, 1953, the Secretary of the Navy for Air issued a "Certification of Need" for the project to the FHA. And by letter of May 29, 1953 the Navy trans-

mitted to petitioner the aforementioned "Certification of Need" and informed petitioner that it would be necessary to obtain an FHA mortgage commitment prior to June 30, 1953, the expiration date of the Title VIII legislation authorizing construction of projects under the Wherry Act. The letter also stated that the "Certification" was delivered upon the further condition that petitioner would effect a closing with FHA for the construction of the project within 90 days of the receipt thereof. In the same letter, the Navy expressly undertook to seek favorable action by the Congressional Committees for the acquisition of petitioner's land (Finding 13, Pet. App. 16a).

3. By letter dated June 18, 1953 to the Navy, petitioner confirmed its oral offer to sell the land proposed as the site for the housing project, "as is", for the sum of $165,000 and to accept a lump sum contract in the sum of $335,000 to fill the land and install utility work (Finding 16, Pet. App. 18a).

4. By letter dated June 19, 1953 petitioner informed the Navy that the aforementioned offer was revised and that petitioner agreed to sell to the Navy the land at a price of $161,375 or a lesser amount, as its value might be determined by independent appraisal acceptable to the Navy. The revised offer expressly stated that it was subject to the respective approvals of the Navy and the Congressional Committees for the acquisition of the site and the issuance by the FHA of a commitment for the project prior to June 30, 1953, satisfactory and acceptable to petitioner (Finding 17, Pet. App. 19a).

5. The Navy informed petitioner that it could accept the option from petitioner to sell the land on the conditions set forth in petitioner's revised offer of June 19, 1953. On June 26, 1953, petitioner granted to the United States of America an option to purchase the land involved (Finding 18, Pet. App. 21a).

6. On June 26, 1953, the FHA filed its final Project Analysis concerning the proposed project, specifying the maximum insurable mortgage to be $4,206,000. On the same date, the FHA issued its Commitment for Insurance to the extent of the maximum insurable mortgage. Further revisions were made to the project and, on July 17, 1953, the Assistant Secretary of the Navy for Air issued an amended Certification of Need, reducing the specified average monthly rental per family from $88.63 to $80.15 on account of the exclusion of gas and electricity from the utilities included (Finding 13, Pet. App. 16a).

7. The FHA issued its Commitment for Insurance on the conditions *inter alia* that at the closing there would be delivered to FHA conformed copies of the Building Loan Agreement between the mortgagee and mortgagor (FHA Form 2441-W), the Construction Contract between the mortgagor and the general contractor whereby the project was to be built (FHA Form 2442-W), the General Conditions of the Contract in the Standard Form Prepared by the American Institute of Architects, FHA Supplementary General Conditions and Assurance of Completion of the project. (See Plaintiff's Exhibit 10, which is reproduced on pages 1a to 3a of the Appendix hereto).

8. By August 14, 1953, the parties had completed arrangements to "close" with FHA and to start construction as soon as respondent obtained title to the site (See Defendant's Exhibit 41, paragraph 7, the pertinent sentence of which is reproduced on page 5a of the Appendix hereto). If the Armed Services Committees of Congress had approved the land acquisition, the Navy's Manager of the Wherry Housing Construction Program on the West Coast, Mr. E. H. Eaton (Tr. 63), "would have advised the District Public Works Officer to proceed with the closing of the contract and

the mortgage and that construction would get under way" (Tr. 67). As the Navy Manager testified, "the closing need consist of no more than filling in the blanks, executing the documents and exchanging papers" (Tr. 67).

The decision of the Court of Claims in *J. W. Bateson Company, Inc., a corporation* v. *The United States*, No. 365-60, decided July 12, 1963, established beyond question that the aforementioned "contractual arrangements" had become "final" and obligated respondent to reimburse petitioner for expenses the latter had incurred in developing a project satisfactory to the Navy prior to the intervention of an Assistant Secretary of Defense, which prevented the Secretary of the Navy from seeking the Congressional Committees' approval for the acquisition of the land. In the *Bateson* case, the Air Force gave plaintiff a "letter of acceptability" which informed plaintiff that its bid to construct 500 Capehart Act housing units was accepted. The letter also said that plaintiff was required to perform the following by the closing date of September 25, 1957:

"(1) form two mortgagor-builder corporations;

(2) arrange for financing by a lender, secured by a mortgage, for the total cost of construction including profit;

(3) cause the mortgagee to obtain mortgage-insurance commitments from the Federal Housing Administration;

(4) cause the mortgagor-builders to be ready to lease the project-land from the United States; and

(5) be ready to execute a four-party housing contract (to be signed by plaintiff, two mortgagor-builders, and the United States)."

By August 22, 1957, plaintiff had done everything required, except for the execution of the papers at the closing (e.g.,

leases, housing contract, payment and performance bond) and the payments to be made by it incident to the closing. However, on August 28, 1957, the Defense Department announced that certain military installations would be closed, including the installation at which the plaintiff was to construct the 500 Capehart Act housing units and the construction of the housing project was thereupon cancelled. The United States admitted and the Court of Claims held that the letter of acceptability represented a binding agreement between the parties entitling plaintiff to recover the cost and expenses properly incurred in performing the requirements set forth in the letter of acceptability as listed above, and that this was so even though the project was ended before the plaintiff commenced construction of the housing project.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

August 5, 1963.

APPENDIX

Plaintiff's Exhibit No. 10

Plaintiff's Exhibit No. 13

Defendant's Exhibit No. 41

Defendant's Exhibit No. 85

Defendant's Exhibit No. 89

Plaintiff's Exhibit No. 10

FEDERAL HOUSING ADMINISTRATION
WASHINGTON, D. C.

COMMITMENT FOR INSURANCE
(Section 803)

Project No. 121-80016

To: PRESIDENT AND DIRECTORS OF THE MANHATTAN CO.
(Mortgagee)
40 Wall Street
New York City 15, New York

E. C. O'DRISCOLL (Name of sponsor(s))
347 Madison Ave., New York, N. Y.
Alameda Bayside Development Corp. I
(Name of proposed Mortgagor)

Dear Sirs:

This Administration, having considered your application and exhibits submitted therewith for the insurance of a mortgage upon the above project, finds said project to be eligible for insurance under the provisions of Section 803 of the National Housing Act, and Administrative Rules and Regulations thereunder now in effect. Subject to such Rules and Regulations and to the following conditions, the Commissioner will endorse as insured (but only to the extent of advances approved by the Commissioner) an original credit instrument, secured by a first mortgage upon the land and property included in the project, as hereinafter identified, in an amount not to exceed $4,206,000.

1. The first year's insurance premium of $21,030.00 shall be paid at closing, and succeeding premiums shall be paid in accordance with the provisions of Article III of the aforesaid Regulations.

2. The loan shall bear interest at the rate of Four per centum (4%) per annum. Amortization shall commence not later than the first day of the 24th month from the date of the mortgage. The loan shall be payable on a level annuity basis by 391 equal monthly payments of principal and interest of $19,277.50.

3. There shall be delivered, at closing, in form satisfactory to the Commissioner:

(*a*) The original credit instrument and mortgage and three conformed copies thereof on forms prescribed by the Commissioner for the particular jurisdiction in which the project is located,

(*b*) Three conformed copies of the Building Loan Agreement between the Mortgagee and the Mortgagor governing advances of the loan. (FHA Form 2441-W.)

(*c*) Four conformed copies of the Construction Contract between the Mortgagor and the general contractor whereby the project is to be built. (FHA Form 2442-W.)

(*d*) The master set, and three extra sets of the final "Drawings and Specifications" (and also Drawings and Specifications for off-site improvements) satisfactory to the Commissioner, including the additional conditions (if any) hereinafter set forth, and including the "GENERAL CONDITIONS OF THE CONTRACT" in "the Standard Form, current edition of the American Institute of Architects," and FHA Supplementary General Conditions, identified by all parties to the transaction.

(*e*) Title evidence in conformity with Section VII of the Administrative Rules above mentioned which shall show that Leasehold title to the property on the date of original endorsement of the mortgage for insurance is vested in the Mortgagor free of all encumbrances other than said mortgage, and all reservations of title (either junior or prior to said mortgage) except such as are specifically waived by this Administration. If such title evi-

dence is in the form of a title insurance policy, it shall by its terms inure to the benefit of the Mortgagee and/or Federal Housing Commissioner, as interest may appear. Such title evidence must be accompanied by a survey of the property located at S/L Central Avenue between Third and Fourth Streets, City of Alameda, Alameda County, California and consisting of approximately 836,352 square feet, together with the surveyor's certificate (FHA Form No. 2457-W), showing that there are no easements or encroachments upon the subject property except those acceptable to this Administration, which survey will be extended from time to time during construction to show that the improvements on the site have been erected solely upon the land covered by the insured mortgage and within the building restriction lines, if any, on said land and do not encroach upon or overhang any land not covered by the mortgage nor upon any easement or rights of ways. Evidence will be required to show that the premises are not zoned or restricted so as to prevent the construction of the improvements and must include building and other permits from legally constituted authorities having jurisdiction. If under the laws of the jurisdiction in which the project is located the chattels and personal property of the Mortgagor required in the operation of the project are not covered by and subject to the terms of the mortgage, the Mortgagee must require and receive from the Mortgagor upon completion of the project a chattel mortgagee or such other security instrument as may be necessary covering such personal property and chattels.

(*f*) Assurance of the completion of the project satisfactory to the Commissioner.

* * * * * * * * * * *

Plaintiff's Exhibit No. 13

ALAMEDA BAYSIDE CONSTRUCTION CORPORATION

REVISED SCHEDULE OF DIFFERENCES IN PLAINTIFF'S CLAIM AND AUDIT

	Schedule of Claim	Audit	Differences Audit Under	Audit Over
Salaries, Manager—Coordinator	$ 14,590.00	$ 14,590.00		
Office Salaries	7,215.00	7,215.00		
Labor—Watchman	513.86	538.72		$24.86
Architect & Design	65,926.65	65,121.58	$805.07	
Drawings & Blueprints	60.16	60.16		
Repairs & Maintenance—Equipment	34.50	34.50		
Living Expenses—Manager—Coordinator	5,837.87	5,837.87		
Surveys, Soundings & Engineering	3,050.14	1,550.14	1,500.00	
Insurance	1,936.72	1,414.90	521.82	
Miscellaneous Job Supplies	194.73	194.73		
Miscellaneous Job Expenses	176.75	176.75		
Depreciation—Machinery & Equipment	4,792.54	4,792.54		
Federal Old Age Benefit Taxes	263.59	263.59		
State Unemployment Insurance Taxes	445.25	445.25		
Personal Property Taxes	815.46	815.46		
Licenses and Permits	94.00	94.00		
Other Taxes	47.00	47.00		
Auto Expenses	2,747.12	2,747.12		
Travel	8,631.90	8,631.90		
Telephone and Telegraph	2,664.85	2,664.85		
Office Supplies	934.83	934.83		
Legal and Audit	35,281.76	33,564.76	1,717.00	
Other Professional Services	260.00	260.00		
Miscellaneous	1,364.29	1,364.29		
Office Rent	2,780.00	2,675.80	104.20	
Depreciation—Office Furniture—Equipment	670.08	670.08		
Contributions	529.70	529.70		
Advertising	399.97	399.97		
Dues and Subscriptions	774.30	774.30		
Interest Expense	42.11	42.11		
Postage	240.26	240.26		
Net Loss on Sale of Equipment	27,629.68	27,629.68		
Corporate Expenses	385.00	385.00		
FHA Filing Fee	12,730.20	12,730.20		
FNMA Commitment Fee	21,030.00	21,030.00		
Totals	$225,090.27	$220,467.04	$4,648.09	$24.86

Defendant's Exhibit No. 41

B-240C/mt
ND12/N4-1

14 August, 1953

Air Mail

From: Chief, Bureau of Yards and Docks

To: Commandant, Twelfth Naval District

Subj: Title VIII housing, Alameda, California; site selection—Congressional clearance of

Ref: (a) COM 12 ltr Ser 20472 of 20 July 50 to BUDOCKS

(b) DPWO 12ND ltr N4-1/(8) 7542/fmb-dn of 11 Oct 50 to BUDOCKS (Copy to COM 12)

(c) COM 12 conf ltr Ser 0346 of 28 May 51 to BUDOCKS

(d) DPWO 12ND spdltr D23-1cg/sm N4-1/8 Ser 2925 of 31 Mar 52 to BUDOCKS (Copy to COM 12)

(e) BUDOCKS spdltr B-432/mm ND12/N4-1 of 18 Aug 52 to DPWO 12ND (Copy to COM 12)

7. It is understood that arrangements have now been completed for 'closing' with FHA and start of construction as soon as the Navy obtains title to this land.

Defendant's Exhibit No. 85

DEPARTMENT OF THE NAVY
BUREAU OF YARDS AND DOCKS
WASHINGTON 25, D. C.

In Reply Refer to
B-432 mm
N4-1
29 Dec 1951

From: Chief, Bureau of Yards and Docks

To: Addressees indicated below

Subj: Assistance from appropriated funds for land acquisition, utility installations and site preparation for Navy Title VIII housing projects

Ref: (a) BUDOCKS multi-addee ltr B432/N4-1 of 5 May 1950

(b) BUDOCKS multi-addee ltr B432/N4-1 of 20 July 1951

(c) BUDOCKS multi-addee ltr B432A/N4-1 of 26 Oct 1951

(d) BUDOCKS multi-addee ltr B432A/N4-1 of 23 Feb 1951

Encl: (1) Dept. of Defense Directive Number 30.06-2 dated 1 Dec 1951; Subject: Expenditure of Funds for Housing Projects

1. References (a), (b) and (c) forwarded Department of Defense instructions for selection of sponsors and processing of projects under Title VIII of the National Housing Act (as amended).

2. In order to assist in the development of Title VIII housing, Section 505 of Public Law 155-82nd Congress provides as follows:

"There are hereby authorized to be appropriated funds for acquisition of land, installation of outside utilities, and site preparation for housing projects to be constructed under Title VIII of the National Housing Act, as amended. Such funds may be expended by the respective military departments for housing projects when the Secretary of Defense, after consultation with the Federal Housing Commissioner, determines that such housing projects should be constructed and that such expenditures are essential to the construction of satisfactory housing. Such expenditures may not exceed an average of $1,500 per housing unit in respect of any housing project, and shall not exceed an average of $1,000 per housing unit in respect of all housing projects for which expenditures are approved under the provisions of this section."

3. The 1952 Public Works Appropriation Act (P.L. 254-82nd Congress) provides funds to the Navy in the amount of $5,000,000 to carry out the authority quoted in paragraph 2 above.

4. Enclosure (1) is the Department of Defense procedure for implementing the above authority and appropriation. These appropriated funds will be used to assist Title VIII housing projects only where (a) it has been determined in accordance with enclosure (1) that such funds are required to construct satisfactory housing, and (b) where the intent to expend appropriated funds is set forth in the "Invitation for Proposals", or, for those projects of 75 units or less which are to be allocated in accordance with reference (c), where it has been determined that the use of appropriated funds is essential.

5. Enclosure (1) has been prepared from the standpoint of new projects, but it is not intended to exclude projects which have advanced beyond the initial planning stage. Projects in various stages of planning should be analyzed at once to determine the need, if any, for appropriated

funds to achieve financial feasibility of the project, in accordance with the policy set forth in paragraph 3 of enclosure (1). Also, where plans and specifications have been essentially completed and have been submitted to the FHA insuring office for Appraisal and Eligibility Statement, a conference should be arranged immediately between the Architect-Engineer, Federal Housing Administration, and District Public Works Officer to determine the need for, and the amount of such appropriated funds.

6. In those instances where projects have already been advertised and bids received, without reference to the use of appropriated funds, and none of the bidders is willing to proceed with the project in conformance with the bid documents, the bids should be rejected and the project readvertised for bids on the basis of a revised Appraisal and Eligibility Statement (if FHA considers revision necessary), incorporating the use of appropriated funds as necessary to achieve satisfactory financing and induce acceptable bids. At present, the only case where consideration will be given by the Bureau to the injection of appropriated funds into the financial structure of a project, after bids have been received and before issuance of FHA commitment, is where FHA concludes during this interim that taxes in a fixed dollar amount, applicable equally to all bidders and not previously included, must be included in the project operating budget.

7. It is the Bureau's intention that the above authority and funds are to be obligated only after careful analysis of construction cost and operating expenses indicate that such assistance is essential to the achievement of an acceptable project. Appropriated funds are not to be considered as a salvaging device for deficiencies in project analysis, planning and estimating. These funds were made available to compensate, insofar as possible, for rising costs, limited rentals, and insured mortgage limitations. In order that funds may be reserved to the greatest extent for projects

in high cost areas, attempts should first be made to correct disparities between the maximum insured mortgage and the total estimated replacement cost through a combination of design modifications and rent increases within the rental maxima established in reference (d) before considering the use of appropriated funds. The alternatives of rental increases and modifications in design apply principally to over-designed projects in the advanced stages of planning, or to projects for which the FHA insuring office is unable to issue a satisfactory Appraisal and Eligibility Statement.

8. Since appropriated funds under the above authority may be expended for improvements on Navy-owned land only, steps should be taken, with respect to projects planned for privately-owned sites, to acquire such sites where it is anticipated that appropriated funds will be required to accomplish a feasible project.

9. In order that appropriate reserves may be established in the Bureau and to preclude over-commitment of appropriated funds, District Public Works Officers should obtain Bureau approval of "earmarkings" considered essential to project feasibility. When the project becomes firm to the point of issuance of FHA Appraisal and Eligibility Statement and if it is found that appropriated funds in excess of the amount originally earmarked are required, Bureau approval of the increased amount must be obtained prior to advertising for bids. As pointed out in paragraph 3(j)(1) of enclosure (1), the amount of appropriated funds which will be required for a project will not finally be determined until bids have been received. On the basis of past experience, it is anticipated that in most cases bids lower than the FHA estimated replacement cost will be received and, therefore, that the appropriated funds actually required will be less than the amount previously established on the basis of the Appraisal and Eligibility Statement. Accordingly, when the certification of the acceptable low bidder is requested by the DPWO, the Bureau

should be advised of the exact amount of appropriated funds to be expended.

10. The Bureau has been informally advised by the Office of the Secretary of Defense that the net floor areas shown on page 3 of enclosure (1) may be interpreted as averages for any single project.

E. L. HANSEN
Assistant Chief for
Business Management

J. G. DODD
Authenticated:
J. G. Dodd, CEC, USN

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1 December 1951
Number 30.06-2
Also numbered as 7150.2

DEPARTMENT OF DEFENSE DIRECTIVE
WASHINGTON 25, D. C.

TITLE BUDGET
SUBTITLE PUBLIC WORKS
NUMBER 30.06-2

Expenditure of Funds for Housing Projects

1. The following policy and procedures are applicable to the expenditure of appropriated funds authorized by Public Law 155, 82nd Congress, for land acquisition, installation of outside utilities (including both on-site and off-site) and site preparation, for housing projects to be constructed

under Title VIII. The procedures herein prescribed are to be integrated with those previously promulgated for processing of Title VIII projects, as appropriate.

(a) *Definitions.* For purposes of this directive the following definitions apply:

(1) Off-Site—Area, government owned, beyond the boundary line of the land covered by the lease.

On-Site—Area covered by the lease.

(2) Floor Area—The space inside the exterior walls, excluding basement (utility room in lieu of basement), attic space, garage, and open porches.

(3) Site preparation and utilities—Removal of existing structures, removal of growth, grading and grubbing, installation of sewer, water, electric, and gas lines to the five foot line of the building, streets, sidewalks, curbs and gutters, fine grading, seeding, sodding, and landscaping.

2. *Acquisition of Land.*

(a) Where Government-owned land is not available for an approved Title VIII project, appropriated funds may be expended by the Service concerned for the acquisition of a suitable site, when the need for such land is definitely determined. Such acquisition may be made in the manner customarily used by the Service for land acquisitions.

(b) Acquisition of title to the land selected as the site for a Title VIII project will result in the conversion of such a project to a "Government-owned land" project and the procedures hereinafter set forth for such projects will then be applicable.

3. *Site Preparation and/or Outside Utilities.*

(a) *Policy.* In general, the policy governing the expenditure of appropriated funds for site preparation and/or outside utilities, will be to limit the expenditure of funds

to that amount which is necessary to achieve the construction of satisfactory housing. It is believed that this objective will be achieved if appropriated funds are used to make up the difference between the maximum insurable mortgage and 90% of the FHA estimate of total replacement cost or 90% of the Sponsor's bid total replacement cost, whichever is lower, and if the Government undertakes to supply the "off-site" utilities for the project.

(b) *Procedures.* Promptly after the execution of the contract with the selected Architect-Engineer, meetings shall be held among representatives of the Military Field Office, the Architect-Engineer and the FHA insuring office to determine the approximate maximum insurable mortgage, the estimated replacement cost of the proposed project and the off-site requirements, if any.

(c) The determination in (b) above will involve a preliminary analysis of number and kind of living units required, type of construction, anticipated income, operating expenses, utilities costs, taxes, construction costs, etc. The target estimated replacement cost (which does not include off-site requirements) will be approximately 111% of the estimated maximum insurable mortgage, where a 90% mortgage is applicable.

(d) The FHA insuring office, on the basis of rental housing costs in the locality, will then determine whether, or to what extent, the type of housing desired can be constructed within the target estimated replacement cost. If it is determined by the FHA insuring office that the total estimated replacement cost of the project will be such that the maximum insurable mortgage will be less than 90% of such estimated replacement cost, the military service concerned will agree to earmark funds (not in excess of $1,000 per dwelling unit, nor in excess of the estimated cost of construction of items for which appropriated funds may be expended under Public Law 155) in an amount sufficient to make up the difference between the estimated maximum

insurable mortgage and 90% of the FHA estimated replacement cost. Prior clearance must be obtained from OSD Comptroller to expend appropriated funds in excess of $1,000 per dwelling unit. However, in no event will appropriated funds be available for projects to achieve areas in excess of those in the following table:

For Officers:	
1 Bedroom Unit	700 square feet
2 Bedroom Unit	990 square feet
3 Bedroom Unit	1160 square feet
For Enlisted Personnel:	
1 Bedroom Unit	635 square feet
2 Bedroom Unit	890 square feet
3 Bedroom Unit	1050 square feet

(e) The "earmarking" under (d) above will be a tentative action only; the final determination as to whether appropriated funds will in fact be required, and the amount thereof, will not be made until after the bids are received, as provided below.

(f) If off-site utilities are required for the project, the Service may agree with FHA to provide such off-site utilities or, if the Service deems such alternative action to be more desirable or appropriate, it may enlarge the area covered by the lease to include the land upon which the off-site utilities are to be located.

(g) After the preliminary determinations in (d) above have been made, the Architect-Engineer will proceed with the preparation of drawings and specifications and other data required by FHA, in close collaboration with the Military Field Office and the local FHA insuring office, with the objective of designing the maximum housing possible within the FHA estimated total replacement cost. When preliminary drawings and specifications have been prepared by the Architect-Engineer they will be submitted to the FHA insuring office, at which time the FHA will re-

examine the feasibility of the project. Any changes necessary to assure the feasibility of the project will be incorporated by the Architect-Engineer in the final drawings and specifications.

(h) When the final drawings and specifications have been completed and submitted to the FHA insuring office, the FHA will issue its Appraisal and Eligibility Statement in which it will set forth firm estimates of maximum insurable mortgage and total replacement cost. If the Service concerned has agreed to provide the off-site utilities, the Appraisal and Eligibility Statement will contain a note to that effect. The FHA will furnish a breakdown of the estimated cost of such improvements. The FHA will also advise the Military Field Office of the estimated amount of appropriated funds per dwelling unit, if any, which will have to be expended by the Service to effect a relationship of 90% between the proceeds which will be available for financing construction (i.e. maximum insurable mortgage plus appropriated funds) and the FHA estimated total replacement cost.

(i) Upon receipt of the Appraisal and Elgibility Statement, the Service concerned will appraise the performance of the Architect-Engineer. If, in the opinion of the Service, the Architect-Engineer has materially exceeded the original target replacement cost, the Service may require the A&E to revise the plans and specifications to reduce the estimated replacement cost of the project rather than increase the amount of appropriated funds originally earmarket for the project. If, however, it is believed by the Service that the A&E has done a competent and professional job in the preparation of the plans and specifications and that the original target replacement cost figure was exceeded because of factors beyond the control of the A&E, the Service may increase the amount of appropriated funds per dwelling unit originally earmarked (but not beyond the $1,000 limitation, except with prior clearance from

OSD Comptroller) in order to meet the increased cost. In some cases it may be deemed advisable by the Service to combine both actions, i.e. to make some revision in the design of the project to achieve a reduction in cost and to make some increase in the amount of appropriated funds over that originally earmarked.

(j) After the foregoing steps have been taken, the Military Field Office will invite proposals from interested sponsors. The Invitation for Proposals will advise bidders:

(1) that the Government is prepared to expend appropriated funds to supplement the insured mortgage proceeds for defraying the cost (or a portion thereof) of certain site preparation and/or on-site utilities work; provided, however, that in no event will such appropriated funds exceed the difference between: (a) the amount of the insured mortgage and (b) 90% of the total replacement cost bid by the successful sponsor or the FHA's estimated total replacement cost, whichever is the lower;

(2) that if the expenditure of appropriated funds is necessary under (1), the sponsor selected will be required, if the Service so elects, to enter into a construction contract with the Service for the performance of such site preparation and/or utilities work as the Service may specify, for a price equal to the amount of the appropriated funds to be expended by the Service; such contract to be in the form generally used by the Service for construction work;

(3) that the government will provide the off-site improvements (if the Service has so agreed with FHA).

(k) At the time the selected sponsor is completing his arrangements for mortgage financing and FHA insurance, the Service will enter into contractual arrangements with him for the performance of the site preparation and or utilities work, if any, required under the foregoing pro-

cedures. The Service will arrange to have the FHA inspect the work to be done by the Sponsor for which appropriated funds are to be expended; such inspection to be carried on contemporaneously with the FHA's inspection of the remainder of the project work. Progress payments for the work covered by Government contract will be made monthly by the Service to the Sponsor in proportion to the percentage of such work completed and/or materials on site, in accordance with established FHA procedure which provides for a 10% hold-back until 30 days after acceptable completion of the work.

(l) If the maximum rentals permitted to be charged by the Sponsor for the project are determined on the basis of "net return", such return shall not include a return upon that part of the project cost which is financed by the expenditure of appropriated funds. However, allowance may be made for operating expenses, replacement reserve and maintenance attributable to that part of the project work financed from appropriated funds.

4. *Projects on Privately-owned Land.* Appropriated funds will not be expended in any case involving privately-owned sites where titles to the land will remain in the Sponsor.

5. To the maximum extent practicable the principles in the foregoing instructions will be utilized for projects which can be negotiated, under existing regulations, or for extensions to existing projects.

/s/ W. J. McNEIL
W. J. McNeil
Assistant Secretary of Defense (Comptroller)

Defendant's Exhibit No. 89

February 26, 1953

Honorable C. E. Wilson
Secretary of Defense
The Pentagon
Washington, D.C.

Dear Mr. Secretary:

I anticipate that certain real estate acquisitions and disposals and certain construction projects will be submitted to this Committee in the near future, pursuant to the requirement of Title VI, Public Law 155, and Section 407 of Public Law 534.

The Committee requests that future submittals made pursuant to the foregoing and which come within the cognizance of the Director of Installations, Department of Defense, contain a paragraph indicating whether the submittal has his concurrence.

Sincerely yours,

LEVERETT SALTONSTALL
Chairman